No. 22633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTALCO ALUMINUM CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF OF INTALCO ALUMINUM CORPORATION.

KINDEL & ANDERSON,
ROY E. POTTS,
510 South Spring Street,
Los Angeles, Calif. 90013,
Attorneys for Intalco Aluminum Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Preliminary Statement.

A statement of the case is contained in the opening brief of Intalco Aluminum Corporation, Petitioner herein. Respondent, National Labor Relations Board (hereinafter referred to as the Board) submitted a counter statement of the case in its brief but the Board's counter statement varied only as to form and as not as to substance from that of Intalco.

Intalco files this reply brief because the Board has failed to meet the issues presented in Intalco's opening brief. The reasoning of the Board in its brief is bottomed on the premise that Intalco recognized a minority union at the time it recognized the Machinists. The Board did not answer the issues raised in this ap-

peal as to how it arrived at the conclusion that a minority union was recognized.

Before the Board can argue that Intalco recognized a minority union it must show, one, that at the time of recognition less than a majority of the unit employees had expressed their preference for the union recognized, and two, that the method employed for ascertaining employee preference was improper.

The first issue concerning the status of employee preference at the time of recognition was raised in Intalco's opening brief and was not answered in the Board's brief.

The second issue likewise remains unanswered. Instead the Board avoids these questions by assuming that a minority union was recognized.

When the Board held in the first instance that the "question concerning representation" was not resolved by the card check conducted by representatives of the State of Washington, it placed squarely in issue the question as to whether or not Intalco followed established procedures. That issue is not resolved by assuming that the result was wrong.

ARGUMENT.

I.

The Board Ignores the Fundamental Question in Its Brief.

The Board misconstrues the issues when it states that the rule in *Midwest Piping Co.,* 63 N.L.R.B. 1060 (1945) is immaterial to these proceedings. In the *Midwest Piping* case the Board held that a check of membership cards was not a satisfactory method of ascertaining majority status of a union when the employer was faced with conflicting *demands* from two or more labor organizations who were competing for representation rights. In the instant case the Board has held that a check of authorization cards is not a proper method of ascertaining status between competing unions when all of the unions competing are not permitted to participate in the check of cards. Whether or not the *Midwest Piping* case is cited in the Board's current decision, the effect of the decision here is to extend the doctrine outlined in the *Midwest Piping* case.

The Board's present position that *Midwest Piping* is of no concern here is directly contradictory to its position taken in the *Boy's Market, Inc.,* 156 N.L.R.B. 105 (1965). There the Board found (and the Circuit Court affirmed in *Retail Clerks Union, Local 770 v. NLRB,* 370 F. 2d 205 (9th Cir. 1966)) that the *Midwest Piping* doctrine was significant and relevant but not applicable to the situation where the employer recognized one of two competing unions after a check of cards of only one of the two unions. The *Retail Clerks* case decided by this Circuit stands for the proposition that the *Midwest Piping* doctrine should not be extended to facts presented here. Implicit in that de-

cision is the holding that the Board's decision in the present case is an unwarranted extension of the *Midwest Piping* rule.

Perhaps the Board's inability to see that its decision in this case is an extension of the *Midwest Piping* doctrine stems from a misapprehension of the holding of the Supreme Court in the case of *International Ladies' Garment Workers' Union, AFL-CIO v. U.S.*, 366 U.S. 731 (1961).

In the Garment Workers' case, the Supreme Court upheld a Board decision finding an employer guilty of an 8(a)(2) violation. The employer had extended recognition to the union upon the representation of the union to the employer that a check of authorization cards in the possession of the union with the number of employees on the payroll had indicated that the union was the majority representative. Neither the employer nor the union made any effort at the time of recognition to check the cards in the union's possession against the employer's current payroll list.

In the instant case the Board cites the following portion of the Court's opinion in the *Garment Workers'* case for the proposition that Intalco's good faith in recognizing the Machinists' Union cannot save it from an 8(a)(2) charge because the Company acted at its peril.

> We find nothing in the statutory language prescribing scienter as an element of the unfair labor practices here involved . . . [P]rohibited conduct cannot be excused by a showing of good faith.

This language when considered in the abstract seemingly would support the General Counsel's contention that good faith is not a relevant consideration in an

8(a)(2) proceeding. However, when the quoted language is placed in context and the reasoning of the Supreme Court considered in its entirety a different conclusion is reached. The Supreme Court did not use the terms "good faith" and "scienter" in the same sense as does the General Counsel and the Board.

The General Counsel implies that the Supreme Court meant that an employer violates Section 8(a)(2) by recognizing a union that subsequently turns out not to represent a majority of the employees notwithstanding the reasonableness of the employer's conduct in initially extending recognition and notwithstanding the method employed by the parties to ascertain the majority status. This reasoning, however, fails to recognize that in the *Garment Workers'* case the employer did not make a reasonable effort to determine whether the Union actually represented a majority of the employees. When the Court said that scienter is not a prerequisite to an 8(a)(2) violation and that good faith on the employer's part is irrelevant, it meant that guilty knowledge is not required and that an employer proceeds at his peril if he recognizes a union upon his *subjective* good faith belief that the union represents a majority of his employees. In using the terms "scienter" and "good faith belief" the Court was not referring to an *objective* good faith belief, that is, a belief that results from the employer's compliance with the objective standards laid down by the Board and courts. The following quotation illustrates that the Court was limiting its "proceed at your peril" ruling to employers who acted unreasonably or carelessly:

> The petitioner, while taking no issue with the fact of its majority status on the critical date,

> maintains that both [the employer's] and his own good-faith belief in petitioner's majority status are a complete defense. To countenance such an excuse would place in permissively careless employer and union hands the power to completely frustrate employee realization of the premise of the Act. . . .

366 U.S. at 738-739. Additional support for the proposition that the Court's referral to scienter and good faith was limited to the subjective state of mind of the employer is found in the following quotation:

> Neither employer nor union made any effort at that time to check the cards in the union's possession against the employee roll, or otherwise, to ascertain with any degree of certainty that the union's assertion, later found by the Board to be erroneous, was founded on fact rather than upon good-faith assumption.

366 U.S. at 734. The Court then went on to state that an employer satisfies the mandates of the Act if he verifies the union's claim of majority by conducting a card check with a reliable third party:

> If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards.

Since in the instant case Intalco did verify the Machinists' claims by means of a card check conducted by

a reliable third party, the *Garment Workers'* case directly supports Intalco's position that the Company did not violate Section 8(a)(2) in extending recognition. The Company properly utilized a reliable objective standard to ascertain the validity of the union's assertion. Under the rule embodied in the *Garment Workers'* case the method employed by Intalco established the Machinists majority status as a *fact* and eliminated assumption as a basis for recognition.

The *Garment Workers'* case stands directly for the proposition that majority status ascertained by a card check conducted by a reliable third party is an objective means of ascertaiing majority status which may be relied upon by an employer and that no "peril" is attached to such recognition. Majority status established by this method is not subject to a hindsight consideration of other elements. The Board's assumption in its brief that Intalco recognized a minority union is erroneous as a matter of law.

This is precisely the effect of the decision of this circuit in *Snow v. NLRB,* 308 F. 2d 687 (9th Cir. 1962). For the Board to say the *Snow* case is inapplicable is to ignore the facts and the law. In view of the Supreme Court's decision in the *Garment Workers'* case and this Court's decision in the *Snow* case the only way in which the Board decision could be permitted to stand would be by a retroactive application of a major policy change. Such policy change would be an extension of the principles announced in the *Midwest Piping* case and a modification of the mandate announced by this Circuit in the *Snow* case.

Intalco conducted itself reasonably, in good faith, and in compliance with the law as it existed at the time

the card check was conducted and the change in policy should not be made applicable to Intalco.

This circuit demonstrated an awareness of the inequities created by retroactive policy making in its opinion in *NLRB v. Guy F. Atkinson Co.,* 195 F. 2d 141, 149 (9th Cir. 1952):

> The inequity of . . . retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors.

Accord, NLRB v. A.P.W. Prods. Co., 316 F. 2d 899, 904-06 (2d Cir. 1963); *NLRB v. E & B Brewing Co.,* 276 F. 2d 594 (6th Cir. 1960); *Pedersen v. NLRB,* 234 F. 2d 417, 419 (2d Cir. 1956); *NLRB v. International Bhd. of Teamsters,* 225 F. 2d 343, 348 (8th Cir. 1955).

II.

The Board's Remedy of Dues Reimbursement Is Contrary to Established Board Policy.

In support of its remedy of dues reimbursement the Board relies heavily on the case of *Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533 (1943). In the *Virginia* case the Board had ordered the disestablishment of a company dominated union and reimbursement of dues paid to the union. Unlike the present case the employer in the *Virginia* case had intentionally violated the Act. And the Supreme Court apparently felt that by requiring the employer to reimburse the employees for dues paid to the company dominated union the policies of the Act would be effectuated. In the *Garment Workers'* case, however, the

employer had acted in good faith although unreasonably so in recognizing the union. The Board and the Court felt that the policies of the Act would not be effectuated by an order that went beyond requiring the employer "to conform his conduct to the norm set out in the Act. . . ." The employer in the Garment Workers' case behaved carelessly whereas Intalco in the instant case behaved carefully and reasonably. As a result, the facts of the present case provide an even more compelling reason for not assessing a monetary remedy.

Board rules governing monetary awards in analogous situations support the view that employer culpability can legally affect the issue of dues reimbursement liability. For example, when a trial examiner absolves an employer of the charges against him and the Board subsequently finds the employer guilty of those charges a back pay order will not include compensation for the period between the conflicting Trial Examiner's report and the Board decision if there was not "deliberate employer intent to obstruct . . . [his employees'] collective activities." *Ferrell-Hicks Chevrolet, Inc.*, 160 N.L.R.B. 1692, 1696 CCH NLRB Dec. ¶ 20,762, 63 L.R.R.M. 1177 (1966). Similarly, a circuit court has held that a Board order requiring the restitution of a Christmas bonus that was discontinued for economic reasons without consulting the union was inappropriate because the employer lacked an anti-union motivation. *NLRB v. Citizens Hotel Co.*, 326 F. 2d 501, 505-06, 508-09 (5th Cir. 1964).

Since the Board considers employers' state of mind to be relevant to monetary awards in 8(a)(3) and 8(a)(5) proceedings, the Board unjustifiably failed to

afford Intalco the same consideration in fashioning the award in this case. Unlike the *Ferrell-Hicks* case and the *Citizens Hotel* case, Intalco was held to have violated Section 8(a)(2) because it conformed its conduct to a court announced rule of law, namely the *Snow* case. Consequently, the facts of this case supply a compelling reason for considering state of mind in refusing to order a monetary remedy.

The foregoing cases serve to emphasize the basic position of Intalco with respect to the dues reimbursement remedy. Intalco followed the established law in extending recognition to the Machinists. On the facts as they appear in the record the acts which would lead to a minority union finding if such acts are properly cognizable as a matter of law are acts of the union and not of the employer. Intalco was without fault. The union received the benefit of the dues deduction. Intalco served only as a conduit for the dues. To order Intalco to reimburse dues is to have Intalco answer for the fault or miscarriage of another. This obviously is wrong.

Conclusion.

The selection of employee bargaining representative concerns employees, unions and employers alike. Stability of the bargaining relationship is essential to national labor policy. To insure stablility the method of selection should be based on objective standards available and known at the time of selection. To permit an after-the-fact challenge to the following of established procedures in selecting the representative is to invite chaos.

Majority status is established as a matter of law after reasonable rules have been followed. By all es-

tablished standards including those of this Court, the Supreme Court of the United States and the Board's own procedures, Intalco properly recognized the Machinists. Absent a showing that established procedures were not followed, the Board should not be permitted to question the results. This is what the Board did in its brief when it assumed that Intalco recognized a minority union.

It is respectfully submitted that the order of the Board should be set aside.

KINDEL & ANDERSON,
ROY E. POTTS,
By ROY E. POTTS,
Attorneys for Intalco Aluminum Corporation.